Nos. 89-1954 and 89-7702

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANTHONY SANTIAGO, PETITIONER

v.

UNITED STATES OF AMERICA

JACK D. LIFFITON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SEAN CONNELLY
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether accomplices of a bank officer who authorized loans, the proceeds of which went to the officer rather than to the nominal borrowers, and who assured the nominal borrowers that they would not be looked to for repayment, were validly convicted of willful misapplication of bank funds under 18 U.S.C. 656.

2. Whether 18 U.S.C. 656 is impermissibly vague.

3. Whether petitioner Liffiton's rights were violated by the alleged use of leads derived from a state-authorized wiretap in investigating federal banking crimes.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a[1]) is reported at 894 F.2d 533.

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[1] The appendix citations are to the appendix in No. 89-1954.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1990. A petition for rehearing was denied on March 20, 1990. The petition for a writ of certiorari in No. 89-7702 was filed on June 4, 1990, and the petition in No. 89-1954 was filed on June 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of one count of aiding and abetting the willful misapplication of bank funds (18 U.S.C. 656), and one count of conspiring to commit that offense (18 U.S.C. 371). In addition, petitioner Santiago was convicted of aiding and abetting the making of false bank entries (18 U.S.C. 1005), and petitioner Liffiton was convicted of making false declarations before a federal grand jury (18 U.S.C. 1623).[2] Petitioner Santiago received a suspended sentence, a three-year term of probation, and a fine of $7,500. Petitioner Liffiton was sentenced to a cumulative term of two years' imprisonment. The court of appeals affirmed. Pet. App. 1a-18a.

1. The facts underlying petitioners' convictions are set forth in the government's opposition to certiorari in *Castiglia*

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[2] Two other co-defendants stood trial with petitioners. Co-defendant Peter Castiglia was convicted of one count of conspiracy to misapply the funds of a federally insured bank (18 U.S.C. 371), two substantive counts of willfully misapplying the funds of a federally insured bank (18 U.S.C. 656), and four counts of making false entries in bank reports (18 U.S.C. 1005). Co-defendant Richard Tocha was acquitted on all counts. The court of appeals affirmed petitioners' convictions in the same opinion that disposed of Castiglia's claims.

v. *United States*, 894 F.2d 533 (2d Cir. 1990), cert. denied, 110 S. Ct. 3238 (1990).[3] Briefly, co-defendant Peter Castiglia authorized a $580,000 loan by the Bank of New York to petitioner Santiago as the nominal borrower; Castiglia assured Santiago that Santiago would not be looked to for repayment. The money was then funneled through a series of transactions to Castiglia, to Castiglia's wholly owned real estate holding company, and to petitioner Liffiton. Liffiton received a total of $188,000 from the $580,000 loan even though his unsecured loans at the bank already exceeded the bank's $1 million lending limit. Santiago, the nominal borrower, received only about $3,500 of the proceeds, and he treated Castiglia as the real borrower. In a subsequent effort to conceal Castiglia's status as the beneficiary of the loan, Liffiton falsely testified before a federal grand jury that he (rather than Castiglia) was the sole shareholder of the real estate holding company. Pet. App. 3a-7a; Gov't C.A. Br. 21-23.

2. Prior to trial, Liffiton moved to dismiss the indictment based upon challenges to state-authorized wiretaps of his residence and a business. A warrant authorizing the wiretaps for a 30-day period had been issued on May 21, 1982, by a New York state judge, Gov't C.A. App. 455-458, based upon an application of the Erie County District Attorney. *Id.* at 409-412. That application was supported by a lengthy affidavit of FBI Agent Joseph R. Coyne detailing the grounds for believing Liffiton was involved in a conspiracy involving narcotics and stolen property. *Id.* at 413-446. On June 18, 1982, the state judge extended the warrant for another 30-day period, *id.* at 469-471, and amended the prior warrant to encompass the state offense of murder and the federal offense of tax evasion, as well as the previously designated state offenses relating to narcotics and

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[3] We have provided each petitioner with a copy of our brief in opposition in *Castiglia*.

stolen property. *Id.* at 475-476. Finally, on October 14, 1983, after the wiretap authorizations had expired but before wiretap evidence had been presented to a federal grand jury investigating Liffiton, the warrant was amended to include conversations relating to violations of federal banking laws. *Id.* at 543-544.

The district court rejected Liffiton's challenge to the sufficiency of Agent Coyne's wiretap affidavit. Based upon the totality of the circumstances and "with deference to the issuing judge's decision," the district court found "that [the issuing judge] had before him adequate evidence to support his finding of probable cause to issue the eavesdropping warrant." Gov't C.A. App. 66-67. The court subsequently denied Liffiton's motion for an evidentiary hearing to challenge Agent Coyne's veracity in attributing information in the wiretap affidavit to unidentified sources. Gov't C.A. App. 139-141. Although the wiretap affidavit did not identify those sources, Liffiton claimed he knew who they were. He submitted an affidavit from a person whom Liffiton claimed to be Source One in the wiretap affidavit. The purported Source One denied having made certain statements that the wiretap affidavit attributed to Source One. Liffiton also offered a hearsay statement by the person Liffiton claimed to be Source Two in the wiretap affidavit. Liffiton said that the purported Source Two had told him he had not made certain statements that were attributed to Source Two in the wiretap affidavit.

Applying the standards of *Franks* v. *Delaware*, 438 U.S. 154 (1978), the district court found that "[a]s to the assumed Source Two, any proof attributable to him must be deemed unreliable in light of the way it has been presented." Gov't C.A. App. 139. With respect to Liffiton's challenge to the statements attributed to Source One, the court found that even assuming Liffiton had made "the substantial initial showing required by *Franks* and that any contradicted

statements in the Coyne affidavit are to be disregarded, enough would remain of the content of that affidavit to establish probable cause upon which to issue a warrant." *Id.* at 140.

The court held an evidentiary hearing on Liffiton's other challenges under the New York and federal wiretap statutes. The court rejected Liffiton's challenge under state law to the wiretap extension order that authorized the district attorney to intercept conversations pertaining to federal income tax violations in addition to the designated state offenses relating to narcotics, stolen property, and murder. Gov't C.A. App. 133-138. Next, relying upon federal case law, the court held that the 15-month delay in amending the wiretap authorization so that it included additional federal banking crimes did not render the communications "unlawfully intercepted" and require suppression of the communications under 18 U.S.C. 2518(10)(a)(i). Gov't C.A. App. 99-101. Instead, the court held that the government simply was required under federal law to have the wiretap authorization amended prior to presenting the fruits of the wiretap evidence to a grand jury, and the court relied upon sworn testimony by the investigating agents and one prosecutor that no such evidence had been presented to the grand jury prior to the amendment. *Id.* at 100-101. Later, the court denied Liffiton's motion for reconsideration, holding that federal law does not prohibit the "nontestimonial" use of intercepted conversations prior to the amendment of the wiretap authorization. *Id.* at 150-151.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court upheld petitioners' willful misapplication and related convictions, for reasons discussed more fully in our brief in opposition in *Castiglia* v. *United States*, *supra*. The court summarily rejected petitioners' other claims of error without discussion. Pet. App. 12a.

ARGUMENT

1. Like Castiglia, petitioners challenge (89-1954 Pet. 8-12; 89-7702 Pet. 7-15) the legal basis upon which they were convicted under 18 U.S.C. 656 for willfully misapplying the funds of a federally insured bank. The Court denied review of Castiglia's identical claims, including his claim that Section 656 is unconstitutionally vague, and there is no reason for a different result here.

a. The Second Circuit held that bank funds are willfully misapplied when the defendant bank officer secretly receives the loan proceeds and assures the nominees that they will not be looked to for repayment, even if the nominal borrowers are creditworthy. Petitioners claim that *United States* v. *Gens*, 493 F.2d 216 (1st Cir. 1974), and *United States* v. *Docherty*, 468 F.2d 989 (2d Cir. 1972), support a contrary theory. In fact, neither case holds that the creditworthiness of a nominal borrower is an absolute shield to liability under 18 U.S.C. 656.

In *Gens*, the First Circuit expressly recognized that criminal misapplication may occur where "bank officials assured the named debtor, regardless of his financial capabilities, that they would look for repayment only to the third party who actually received the loan proceeds." 493 F.2d at 222. Indeed, as the court below observed: "[I]n *Gens* the First Circuit reversed the convictions of nominee borrowers who recognized their repayment obligations, but remanded the one count involving a wealthy individual who signed his note with the understanding that he personally would not have to repay the loan, barring some 'catastrophe.' " Pet. App. 9a (quoting 493 F.2d at 220, 223). Hence, there is no conflict between the instant case and *Gens*.

Similarly, in the Second Circuit's earlier decision in *Docherty*, the defendant named debtor "knew he was

putting his own credit on the line." 468 F.2d at 995. Accord *Gens*, 493 F.2d at 223 & n.15 ("[T]he key point made by [*Docherty* is] that there can be no harm to the bank, and thus no misapplication, where the named debtor is *both* financially capable *and fully intends to repay the loan*." (Emphasis added)). This case is consistent with the result in *Docherty* because Castiglia assured Santiago, the named debtor, that Santiago would not be looked to for repayment.

b. In the alternative, the Second Circuit held that a bank officer's approval of a loan for his own benefit, while concealing his personal interest in the proceeds, constitutes willful misapplication within the meaning of 18 U.S.C. 656. It is true that, prior to this case, the Second Circuit's *Docherty* rule seemed out of step with an otherwise unbroken line of federal circuit court authority finding misapplication whenever a bank officer knowingly caused a "loan to be made to his own benefit, concealing his interest from the bank." *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933 (1969).[4] The Second Circuit in this case, however, disavowed that aspect of *Docherty*. Pet. App. 20a. In addition, it is questionable whether the First Circuit would adhere to the position it adopted in *Gens* with respect to a bank officer's concealment of his interest in a loan in light of the 1978 enactment of 12 U.S.C. 375b, which restricts the circumstances in which a federally insured bank may make loans to its officers. See *United States* v. *Krepps*, 605 F.2d 101, 107 n.21 (3d Cir. 1979).

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[4] See also *United States* v. *Woods*, 877 F.2d 477, 479 (6th Cir. 1989); *United States* v. *Shively*, 715 F.2d 260, 265-266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Steffen*, 641 F.2d 591, 597 (8th Cir.), cert. denied, 452 U.S. 943 (1981); *United States* v. *Krepps*, 605 F.2d 101, 106-107 (3d Cir. 1979); *United States* v. *Twiford*, 600 F.2d 1339 (10th Cir. 1979); *United States* v. *Kennedy*, 564 F.2d 1329, 1338-1339 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978).

2. Nor is there any merit to petitioners' claims that 18 U.S.C. 656 is unconstitutionally vague. 89-1954 Pet. 9-10; 89-7702 Pet. 7-11. Every court to consider this argument has rejected it. See, *e.g.*, *United States* v. *Krepps*, 605 F.2d 101, 104 n.13 (3d Cir. 1979); *United States* v. *Mann*, 517 F.2d 259, 268 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Cooper*, 464 F.2d 648, 651 (10th Cir. 1972), cert. denied, 409 U.S. 1107 (1973); *United States* v. *Fortunato*, 402 F.2d at 82.

Notwithstanding the consensus of the courts of appeals, petitioners rely upon *United States* v. *Britton*, 107 U.S. 655 (1883), for the proposition that the term "willfully misapplied," as used in an earlier version of the statute, had no settled meaning. 89-1954 Pet. 9-10; 89-7702 Pet. 7. In that case, however, the Court clarified that "the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association." 107 U.S. at 666. Accordingly, the Court held that the criminal sanction did not reach mere "acts of maladministration of the affairs of [a bank] by its officers," but instead was limited to misapplication benefiting the officer or some third party. *Id.* at 668. Consistent with *Britton*, the jury here was instructed that a "mere act of maladministration is insufficient to constitute a violation of the section." 23 Tr. 47. There was ample evidence, including the indisputable facts that Castiglia personally benefited from the loans and took affirmative steps to hide his status from the bank, upon which the jury could base its verdict that Castiglia acted with the necessary criminal intent and that petitioners conspired with him and aided and abetted his unlawful conduct.[5]

[5] Petitioner Liffiton's related challenge (Pet. 16-17) to the sufficiency of the evidence against him is meritless. Liffiton was a prime

Finally, to the extent petitioners seek to raise a facial attack upon 18 U.S.C. 656, their claim must fail because they cannot "demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). Given the district court's detailed instructions that the jury could not convict petitioners under the statute unless Castiglia and petitioners acted with specific criminal intent, see 23 Tr. 30-32, 46-47; see also 23 Tr. 60-63, petitioners cannot raise any colorable claim that the statute was impermissibly vague as applied to them. Cf. *Colautti* v. *Franklin*, 439 U.S. 379, 395 n.13 (1979) ("requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid" (quoting *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945)).

3. There is also no basis for further review of Liffiton's fact-bound challenges (Pet. 17-23) under New York and federal law to the state-authorized wiretaps. As an initial matter, it should be noted that no wiretap evidence was introduced against Liffiton at trial. Moreover, the district court reasonably interpreted New York state law as allowing the state district attorney to obtain authorization to intercept conversations relevant to federal offenses in addition to the designated state offenses listed in the New York statute. See Gov't C.A. App. 133-138. The district court's ruling on this point of state law does not warrant further review by this Court.

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beneficiary of the loan proceeds (receiving $188,000) and took several steps to further the conspiracy and aid and abet the substantive violation, including disbursing the loan proceeds in a manner that concealed the identities of the loan beneficiaries, lying to federal agents and the federal grand jury about Castiglia's status as a beneficiary of the loan, and seeking to procure false testimony by others. Pet. App. 4a-6a.

Nor is further review warranted with respect to the district court's denial of an evidentiary hearing on Liffiton's challenge to the veracity of Agent Coyne's affidavit supporting the wiretap. Consistent with *Franks* v. *Delaware*, 438 U.S. 154, 171-72 (1978), the district court found that, even it Liffiton had made the requisite substantial initial showing of falsity, an evidentiary hearing would not have been required because there was still sufficient information in the affidavit, after disregarding the challenged statements, to establish probable cause. Gov't C.A. App. 139-141. The court unquestionably applied the correct legal methodology under *Franks*, and any remaining fact-specific issues involved in the district court's ruling would not warrant further review.

Finally, there is no merit to Liffiton's claim (Pet. 17-18) that the delay in amending the wiretap authorization to include the interception of conversations related to banking crimes should have precluded federal investigators from pursuing leads to witnesses and evidence revealed in those conversations. As an initial factual matter, we dispute Liffiton's claim that "[w]ithout the benefit of the wiretap the government would never have learned of the transaction in question." *Ibid.* To the contrary, FBI Agent John J. McGuigan testified at the suppression hearing that when the instant investigation began in September 1982, he was not aware of any previous investigation or wiretaps involving Liffiton. See Gov't C.A. Br. 42.

In any event, Liffiton's claim is incorrect as a matter of law because amendment of an authorization order is required only if the government seeks to offer testimony that would disclose "the contents [of the intercepted communications] and any evidence derived therefrom" in a grand jury or trial proceeding. 18 U.S.C. 2517(5). In contrast, the statute expressly provides that where the wiretap intercepts "communications relating to offenses other than those

specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section." *Ibid.* In turn, subsections (1) and (2) of 18 U.S.C. 2517 provide that any agent who has obtained knowledge of the contents of an intercepted conversation through a lawful wiretap "may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure," 18 U.S.C. 2517(1), and "may use such contents to the extent such use is appropriate to the proper performance of his official duties," 18 U.S.C. 2517(2). Thus, the agents here were fully entitled to pursue leads derived from the wiretaps without having to amend the authorization to include the banking crimes upon which Liffiton ultimately was indicted. *United States* v. *Johnson*, 539 F.2d 181, 187 (D.C. Cir. 1976) ("The statute requires prior judicial approval for use of other-crimes fruits of a wiretap, only where the information is to be offered in testimony at a federal or state proceeding."), cert. denied, 429 U.S. 1061 (1977); see also *United States* v. *Donlan*, 825 F.2d 653, 655 (2d Cir. 1987); *United States* v. *Ricco*, 566 F.2d 433, 435 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978).[6]

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[6] There is no merit to petitioner's claim (Pet. 17-18) that the decision here conflicts with *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), and *United States* v. *Brodson*, 528 F.2d 214 (7th Cir. 1975), both of which involved the presentation of wiretap evidence in grand jury proceedings prior to the amendment of the authorization.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SEAN CONNELLY
Attorney

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